

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ELMER G. AKINS, JR.

Claimant

VS.

CUSTOM CAMPERS, INC.

Self-Insured Respondent

)
)
)
)
)
)

Docket No. 1,030,906

ORDER

Respondent appealed the March 31, 2009, Award entered by Administrative Law Judge Thomas Klein. The Workers Compensation Board heard oral argument on August 11, 2009.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a September 5, 2005, accident and resulting injuries. In the March 31, 2009, Award, Judge Klein adopted the opinions of Dr. Edward J. Prostic and Dr. John D. Pro and found that claimant was permanently and totally disabled as a result of his work injury. Accordingly, the Judge granted claimant benefits for a permanent total disability.

Respondent contends Judge Klein erred in finding claimant was entitled to receive benefits for a permanent total disability. Respondent maintains claimant should be awarded benefits for separate scheduled injuries to his upper extremities based upon a 4.6 percent rating to the right upper extremity and a 4.6 percent rating to the left upper extremity.

Claimant asserts that the Judge, in adopting the opinions of Dr. Prostic and Dr. Pro, correctly found that claimant is permanently and totally disabled. Claimant requests the Board to affirm the Award.

The only issue before the Board on this appeal is the extent of claimant's disability from his bilateral upper extremity injuries. Although there is some evidence in the record that claimant also has knee problems, claimant is not alleging those problems are related to the repetitive trauma accident that is the subject of this claim.¹

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Respondent manufactures recreational vehicles. Claimant worked for respondent for approximately 13 years and developed repetitive trauma injuries in both upper extremities. The parties stipulated that September 5, 2005, would be used as the date of accident for these injuries.

In February 2006, claimant underwent right carpal tunnel release surgery. A couple of weeks later, in early March 2006, claimant had left carpal tunnel release surgery. Claimant continued working for respondent until he was terminated on August 24, 2006. Shortly thereafter, in late October and in mid-November 2006, claimant had right and left ulnar nerve decompression surgeries at his elbows, respectively. Dr. J. Mark Melhorn of Wichita, Kansas, performed those four surgeries.

Past functional impairment ratings

But this is not the first time claimant experienced problems with his upper extremities. Claimant's medical expert witness, Dr. Edward J. Prostic, had examined claimant in February 2002 for purposes of an earlier workers compensation claim and found claimant had undergone two carpal tunnel release surgeries on the right and had evidence of left carpal tunnel syndrome and epicondylitis in both elbows. In February 2002, Dr. Prostic rated claimant as having a 15 percent impairment to each upper extremity as measured by the *AMA Guides*.²

¹ Prostic Depo. (Dec. 7, 2007) at 24-26.

² *Id.*, at 35. The *AMA Guides* refers to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.); all references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Melhorn, who is board-certified in orthopedics, also evaluated claimant in 2002 following the two carpal tunnel release surgeries that had been performed by Dr. David Black. Dr. Melhorn evaluated claimant in April 2002 and believing that he had undergone bilateral carpal tunnel release surgery³ (instead of two releases on the right wrist) rated claimant as having a 7.05 percent impairment to each arm (or 8 percent whole person⁴) pursuant to the *AMA Guides*.

Present functional impairment ratings

Dr. Melhorn treated claimant commencing September 2006 and released him from medical treatment to regular work in January 2007. The doctor did not find that claimant had any increased functional impairment due to the bilateral carpal tunnel syndrome. Indeed, Dr. Melhorn believed claimant's impairment under the *AMA Guides* from the operated bilateral carpal tunnel syndrome had actually improved from 7.05 percent to 5.3 percent to the level of each forearm.⁵ Nevertheless, Dr. Melhorn indicated he would adopt as his opinion the higher of the two impairments, or 7.05 percent impairment to each arm,⁶ as the impairment claimant sustained due to his bilateral carpal tunnel syndrome. And for claimant's bilateral ulnar nerve entrapment at the elbows, Dr. Melhorn rated claimant's impairment at 4.6 percent to each arm using the *Guides*.⁷

On the other hand, Dr. Prostic, who last saw claimant in March 2007, concluded claimant sustained a 10.5 percent impairment to each upper extremity at the level of the forearm due to the carpal tunnel syndrome and a 10 percent impairment to each upper arm for the ulnar nerve problem. Combining those impairment ratings, the doctor determined claimant had a 15 percent impairment to each arm⁸ under the *AMA Guides*⁹ or a 17 percent whole person impairment.¹⁰ And assuming claimant had a 25 percent whole

³ Melhorn Depo., Ex. 3.

⁴ *Id.*

⁵ Melhorn Depo. at 10, 11.

⁶ *Id.*, at 11.

⁷ *Id.*, at 50 and Ex. 3.

⁸ Prostic Depo. (Jan. 23, 2009) at 10.

⁹ Prostic Depo. (Dec. 7, 2007) at 16.

¹⁰ Prostic Depo. (Jan. 23, 2009) at 4.

person impairment due to psychological problems related to his upper extremity injuries, the doctor concluded claimant would have a 38 percent whole person impairment.¹¹

Dr. Prostic testified his present upper extremity ratings are over and above the ratings (15 percent for each arm) he gave claimant in 2002.¹² The doctor explained that in 2002 he diagnosed bilateral epicondylitis, which had largely healed over time. In short, the doctor believed most of claimant's present difficulties emanate from the ulnar nerve at both elbows and wrists, which claimant did not have in 2002, rather than from the carpal tunnel syndrome and lateral epicondylitis problems that claimant had in 2002.¹³

Claimant also maintains that he has depression and other psychological problems due to the repetitive trauma injuries that are the subject of this claim. At his attorney's request, claimant was evaluated in February 2008 by Dr. John D. Pro, a psychiatrist from Lee's Summit, Missouri. The doctor diagnosed major depressive disorder and a pain syndrome with medical and psychological factors,¹⁴ which resulted from claimant's cumulative trauma injuries.¹⁵ Using both the second and fourth editions of the *AMA Guides*, the doctor concluded claimant sustained a 25 percent whole person impairment from his depression and pain syndrome.¹⁶

Considering the entire record, the Board concludes claimant has sustained additional impairment to his upper extremities and psychological problems due to his work-related upper extremity injuries. The Board, however, is not persuaded that Dr. Melhorn's ratings are any more accurate than Dr. Prostic's. Accordingly, the Board averages their ratings (4.6 percent additional impairment to each upper extremity per Dr. Melhorn and 15 percent additional impairment to each upper extremity per Dr. Prostic) and finds that claimant has sustained an additional 9.8 percent impairment to each upper extremity, or 12 percent impairment to the whole person, as a result of his September 5, 2005, accident.

The Board is persuaded by Dr. Pro's testimony that claimant has developed depression and a pain syndrome due to his cumulative trauma injuries. Accordingly, the Board finds claimant has sustained a 25 percent whole person impairment due to his

¹¹ *Id.*, at 8.

¹² *Id.*, at 11.

¹³ Prostic Depo. (Dec. 7, 2007) at 36.

¹⁴ Pro Depo. at 13.

¹⁵ *Id.*, at 14.

¹⁶ *Id.*, at 15, 16.

psychological condition. Using the *AMA Guides* combined values chart to combine the ratings for claimant's physical and psychological injuries yields a 34 percent whole person impairment.

Claimant's present ability to work

Dr. Melhorn opined that claimant could do the majority of activities that he had done in the past, but that claimant should avoid using large power vibratory tools such as a jackhammer, chain saw, and stone quarry drill.¹⁷

Conversely, Dr. Prostic recommended more stringent restrictions for claimant because of the three surgeries to his right wrist. Dr. Prostic believes it is imperative to prevent claimant from developing carpal tunnel syndrome again as another surgery could be catastrophic to claimant's right median nerve. Consequently, the doctor recommended that claimant limit gripping and lifting up to 30 pounds and no more than 10 percent of the time; avoid frequently gripping with either hand; limit gripping and grasping to no more than occasionally; avoid vibrating tools; avoid twisting with the wrists; limit frequent lifting to 10 pounds or less; and avoid frequent keying.

Dr. Prostic reviewed a list of claimant's former work tasks as prepared by claimant's vocational expert, Karen Crist Terrill. The doctor determined claimant should not do 11 of the 18 nonduplicative tasks, or 61 percent. Moreover, the doctor concluded claimant was realistically permanently and totally disabled when considering claimant's upper extremity injuries, knee problems,¹⁸ depression, work background, and IQ.¹⁹

Respondent's vocational expert, Steve Benjamin, compiled a list of 19 nonduplicative work tasks claimant performed in the 15 years before the September 2005 accident. Mr. Benjamin concluded if claimant was not returned to the wages he received from respondent, claimant retained the ability to earn approximately \$316 per week. Mr. Benjamin indicated the following jobs were representative of those that claimant retained the ability to perform without violating Dr. Prostic's recommended work restrictions; namely, cleaning offices and buildings, delivery driver, electrical bench assembler, parts clerk, and security guard.

¹⁷ Melhorn Depo. at 29.

¹⁸ Dr. Prostic felt claimant's knees warranted the following restrictions: only occasional squatting, kneeling, climbing; avoid constant standing or walking; limit standing to no more than 50 minutes at a time; and minimal work on uneven surfaces.

¹⁹ Prostic Depo. (Dec. 7, 2007) at 30, 31.

Claimant's vocational expert, Ms. Terrill, reviewed testing performed by a school psychologist, Mary Lynn Sylvester, and indicated that claimant had an IQ between an 8- and 10-year-old person and that his test scores placed his reading at the 9th grade level, math skills at the 11th grade level, and academic skills at the 8th grade level. Moreover, considering Dr. Prostic's work restrictions and claimant's work history and IQ test results, Ms. Terrill concluded claimant was realistically unemployable. Ms. Terrill believed that claimant's hand restrictions eliminated almost all of the jobs in the unskilled sedentary category. According to Ms. Terrill, sedentary unskilled jobs comprise about 10 percent of the labor market and claimant's hand restrictions eliminate all but 3 percent of the labor market. And Ms. Terrill believes that remaining 3 percent of the labor market realistically would not exist for claimant.²⁰

Dr. Pro also thought claimant was realistically unable to engage in any substantial and gainful employment considering both claimant's physical injuries and psychological impairment.²¹ He also testified that legal evaluations comprised about 30 percent of his practice with one-third of those evaluations being performed for defendants and two-thirds for plaintiffs. And he estimated that over the last three years he has performed from six to 10 evaluations for claimant's attorney, whom he charged \$2,400 for six hours of reviewing claimant's records, interviewing claimant, and preparing a report. Unlike Dr. Moeller (a clinical psychologist who evaluated claimant at respondent's counsel's request), Dr. Pro did not believe claimant was malingering. Moreover, Dr. Pro did not believe either malingering or depression were conditions that could be diagnosed by psychological tests. The doctor testified, in part:

[The MMPI is a test that] includes a scale that can perhaps if positive, can raise a suspicion for malingering. There is no test to diagnose malingering. There is no written psychological test for that. That's an issue that's based on the examiner's knowledge, training and experience.²²

Dr. Pro, however, indicated there were other stressors besides injuries that caused stress in claimant's life. For instance, claimant, who is in his late 40s, is in his third marriage, married to a 21-year-old woman who gave birth in December 2007, and living with his wife's disabled grandmother and his wife's mother who is ill. Nonetheless, Dr. Pro attributed claimant's depression and psychological problems to his loss of work and the chronic pain from his work-related injuries.

²⁰ Terrill Depo. at 17.

²¹ Pro Depo. at 18.

²² *Id.*, at 34.

Respondent's counsel had claimant evaluated in early July 2008 by Dr. T. A. Moeller, who is a clinical psychologist and former chief psychologist at the Wichita, Kansas, branch of the University of Kansas School of Medicine. Dr. Moeller treats patients and evaluates individuals for the Social Security Administration, insurance carriers, prosecutors, defense counsel and plaintiffs' counsel. Dr. Moeller administered a number of tests, which included a memory test (Test of Memory Malinger) that indicated claimant was malingering.²³ Another test (Structured Interview of Malingered Symptoms) "suggested that there was a probability of malingering and indication for further assessment of that."²⁴ Plus, the doctor testified that certain validity scales on the MMPI-2 indicated that malingering needed to be considered. In short, Dr. Moeller indicated that if claimant's clinical scales were accurate he would be unable to function outside a mental hospital.²⁵

Another two tests (Millon Behavioral Medicine Diagnostic test and Millon Clinical Multiaxial Inventory-III test) administered by Dr. Moeller indicated claimant may have reported more emotional and psychological symptoms than objectively exist.²⁶

Dr. Moeller testified there was no indication in the results of the various tests that he administered that indicated claimant was experiencing any psychological issues caused or made worse by his work-related injuries.²⁷ The doctor identified other problems or stressors that claimant was experiencing, which included the overutilization of alcohol; bitterness over his and co-workers' termination from respondent's employment allegedly due to their work-related injuries; financial problems; his current marital relationship; and having an infant.

On the other hand, two tests (Paulhus Deception Scales test and Miller Forensic Assessment of Symptoms Test) did not reflect malingering.²⁸

Claimant has now undergone a total of three surgeries on his right wrist, one on his left wrist, and one on each elbow. He has lost his job working for respondent and is now unemployed. Claimant has depression and a pain syndrome. And Dr. Pro has recommended "aggressive pain management, psychotherapy and antidepressant

²³ Moeller Depo. at 13.

²⁴ *Id.*, at 14, 15.

²⁵ *Id.*, at 17, 18.

²⁶ *Id.*, at 53, 54.

²⁷ *Id.*, at 18.

²⁸ *Id.*, at 52.

medication, coupled with weight loss, physical therapy, and exercise”²⁹ in hopes that claimant might improve. But the record fails to indicate that claimant has sought any of that recommended treatment either within or outside of this workers compensation claim. Indeed, claimant did not request an award of psychological treatment in his brief to the Board. There are musings in the record that claimant had obtained medications for depression but he unilaterally decided to stop taking them.³⁰ This is inconsistent with some of claimant’s assertions as to the extent of his pain, depression and other symptoms. In short, the Board is not persuaded claimant is permanently and totally disabled from engaging in any substantial and gainful employment. Rather, the Board finds claimant retains the ability to work.

CONCLUSIONS OF LAW

Claimant’s permanent disability benefits are governed by K.S.A. 44-510e, which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Claimant is not employed and, therefore, the difference between his average weekly wage on the date of accident and his present average weekly wage is 100 percent. There

²⁹ Pro Depo., Ex. 2 at 6.

³⁰ Moeller Depo., Ex. 2 at 3.

is only one opinion regarding claimant's task loss and that is from Dr. Prostic, who determined claimant had lost the ability to perform 61 percent of his former work tasks. That opinion is credible and is adopted by the Board.

Averaging the 100 percent wage loss and claimant's 61 percent task loss, the Board concludes claimant has an 81 percent permanent partial disability.

But claimant had preexisting impairment that must be deducted from his 81 percent permanent partial disability. Dr. Pro indicated claimant's preexisting psychological impairment comprised 15 percent to the whole person. As indicated above, Dr. Melhorn rated claimant in 2002 as having an 8 percent whole person impairment due to his arm injuries and Dr. Prostic rated claimant as having a 15 percent impairment to each upper extremity (17 percent whole person impairment). Averaging those impairment ratings and using the *AMA Guides* combined values chart, the Board finds claimant's work disability award should be reduced under K.S.A. 44-501(c) for a preexisting impairment to the whole person of 26 percent.

In conclusion, claimant is entitled to receive an award under K.S.A. 44-510e for a 34 percent whole person impairment³¹ until his termination on August 24, 2006, followed by a 55 percent work disability.

AWARD

WHEREFORE, the Board modifies the March 31, 2009, Award entered by Judge Klein.

Elmer G. Akins, Jr., is granted compensation from Custom Campers, Inc., for a September 5, 2005, accident and resulting disability.

Based upon an average weekly wage of \$527.39, Mr. Akins is entitled to receive 11 weeks of temporary total disability benefits at \$351.61 per week, or \$3,867.71.

Based upon an average weekly wage of \$527.39, for the period ending August 24, 2006, Mr. Akins is entitled to receive 39.43 weeks of permanent partial disability benefits at \$351.61 per week, or \$13,863.98, for a 34 percent permanent partial disability.

Based upon an average weekly wage of \$527.39, for the period from August 25, 2006, through September 30, 2006, Mr. Akins is entitled to receive 5.29 weeks of

³¹ The permanent disability benefits for this impairment rating are not reduced by an amount for preexisting impairment because the preexisting amount is already excluded.

permanent partial disability benefits at \$351.61 per week, or \$1,860.02, for a 55 percent permanent partial disability.

Based upon an average weekly wage of \$561.12, for the period commencing October 1, 2006, Mr. Akins is entitled to receive 183.53 weeks of permanent partial disability benefits at \$374.10 per week, or \$68,658.57, for a 55 percent permanent partial disability and a total award of \$88,250.28.

As of September 30, 2009, Mr. Akins is entitled to receive 11 weeks of temporary total disability compensation at \$351.61 per week in the sum of \$3,867.71, followed by 44.72 weeks of permanent partial disability compensation at \$351.61 per week in the sum of \$15,724, followed by 156.57 weeks of permanent partial disability compensation at \$374.10 per week in the sum of \$58,572.84 for a total due and owing of \$78,164.55, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$10,085.73 shall be paid at \$374.10 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority as I believe the greater weight of the evidence establishes that claimant is permanently and totally disabled due to the

combination of his physical and psychological injuries. The majority accepts Dr. Pro's opinions that claimant has sustained impairment due to his psychological problems but rejects the doctor's opinions regarding their severity. I find Dr. Pro's testimony persuasive that claimant is realistically unable to work. Indeed, the doctor explained how claimant's pain aggravates his depression, which in turn aggravates his pain and creates a pain syndrome.

[Claimant] has two psychological illnesses that have arisen from his injury. One of which is this pain syndrome.

And the feature of a pain syndrome is that the pain[,] suffering and the lowered pain thresholds are -- give rise to impairment themselves. The pain syndrome causes impairment. And granted they may -- that suffering may go beyond what is ordinarily, what we ordinarily expect what the orthopedists see, but that doesn't mean the pain isn't real. I think that's my point.

. . . .

Actually, the pain syndrome is -- yes, the work injury has been a factor in the pain syndrome, but we're talking about the mechanism of the injury or the mechanism of his diagnoses and it's hard to describe, but basically he has not been able to work, has developed pain so he gets depressed and then the depression ends up magnifying his suffering from the pain and making it -- creating the pain syndrome itself, which is a syndrome of increased preoccupation and suffering from his pain.³²

Dr. Pro's opinion that claimant is unable to work is bolstered by the opinions of both Dr. Prostic and Ms. Terrill. In short, claimant has now undergone a total of six surgeries on his wrists and elbows and he continues to suffer pain and psychological issues that realistically prevent him from working. Furthermore, claimant risks denervation of the median nerve in his right wrist if he undergoes another operation for carpal tunnel syndrome in that wrist.

[Claimant's] real problem is that he's been operated on his carpal canal three times on the right side. And if anyone operates on it again, they run the risk of denervating the median nerve and causing a catastrophe to the median nerve. So you really can't allow this guy to get carpal tunnel syndrome again on the right.³³

³² Pro Depo. at 41-44.

³³ Prostic Depo. (Dec. 7, 2007) at 17.

Finally, there is a presumption that claimant is permanently and totally disabled. And respondent has failed to present sufficient evidence to rebut that presumption.³⁴

In conclusion, claimant should be awarded permanent total disability benefits and psychological treatment. He should not be penalized because the record fails to explain why he has not sought such treatment in this claim.

BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the decision of the majority in the above matter. This Board Member agrees that claimant has failed to prove that he is permanently and totally disabled. However, claimant has also failed to prove that he has suffered a psychological impairment as the result of his work-related injuries. The majority's decision was based on the opinion of claimant's expert psychiatrist, John D. Pro, M.D., who diagnosed major depressive disorder and pain syndrome. However, Dr. Pro, in administering claimant psychological tests, used tests which involved self-rating and self-reporting by claimant. His evaluation did not include any tests which provide an external measure of the validity of claimant's self-reported difficulties and symptoms. The actual diagnosis of depression was determined through claimant's self-reporting, and not through any psychological tests to actually determine if claimant suffered from depression. The information provided to Dr. Pro by claimant was proven inaccurate when claimant told the doctor he had never had a previous workers compensation claim. This was shown to be false with information from the 2002 workers compensation settlement for claimant's previous carpal tunnel syndrome. Dr. Pro also determined that claimant had a lower pain threshold resulting in a pain syndrome. However, claimant is able to contain his pain with over-the-counter pain medication. There is no indication that claimant has requested stronger pain medication from his authorized treating physician.

Clinical psychologist T. A. Moeller, Ph.D., subjected claimant to a battery of psychological tests to determine not only the proper diagnosis, but also whether claimant was malingering or whether claimant had a demonstrable psychological impairment.

³⁴ *Bergstrom v. Spears Manufacturing Company*, ___ Kan. ___, 214 P.3d 676 (2009); *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007); *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

Dr. Moeller found no indication of psychological problems from claimant's work injuries. Dr. Moeller's opinion relied on tried and true psychological tests, and not on the self-serving responses of claimant. Here, the opinion of Dr. Moeller should carry more weight than that of Dr. Pro. In this Board Member's opinion, claimant has failed to prove a psychological impairment as the result of the injuries suffered while working for respondent. Claimant's award should be limited to the functional impairments to his bilateral upper extremities.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent
Thomas Klein, Administrative Law Judge